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IN THE

Supreme Court of the United States

October Term, 1946

No. 331

J. A. HAGAN, individually, and doing business as EL REY CHEESE CO., JACK AROS and EVERETT HAGAN,

Petitioners,

vs.

PAUL A. PORTER, Administrator, OFFICE OF PRICE ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of the Matter Involved.

The petitioners (appellants below) Jack Aros and Everett Hagan, are employees of one J. A. Hagan, doing business as El Rey Cheese Co. J. A. Hagan at all times herein mentioned was engaged in the business of selling

various types of cheeses. The respondent is the Price Administrator, Office of Price Administration.

Upon August 13, 1945, alleged administrative subpoenas *duces tecum,* identical in form, were served upon petitioners Jack Aros and Everett Hagan, requiring each of them to appear and testify on August 16, 1945, before an enforcement attorney of the Office of Price Administration concerning certain sales and purchases of cheese products made by J. A. Hagan, and to produce at the said time and place similarly described records belonging to said J. A. Hagan concerning said purchases and sales.

On the return date, petitioners Jack Aros and Everett Hagan appeared specially by their attorney and moved to quash the issuance and service of the subpoenas on several grounds. Without any ruling thereon, the respondent, under the provisions of Section 202(e) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23; U. S. C. A. Title 50, App., Sec. 901-946), as amended (Pub. L. 108, 79th Cong., 1st Sess.), applied to the United States District Court by petition, with alleged supporting affidavits, for an order compelling obedience to the subpoenas.

Petitioners Jack Aros and Everett Hagan filed affidavits in response to the Court's Order to Show Cause, based on the following grounds:

(1) That none of the testimony sought to be elicited and none of the documents sought to be produced were material or relevant to any investigation the respondent was empowered to make.

(2) That the subpoenas were invalid.

(3) That the subpoenas were unreasonable, uncertain, and indefinite.

(4) That petitioners had not failed to answer and appear at the time and place called for in the subpoenas.

(5) That the subpoenas were not served upon J. A. Hagan, the person licensed and engaged in business, but upon petitioners who were merely employees, and that the documents were neither the property of petitioners or within their custody.

(6) That the subpoenas violate the Fourth and Fifth Amendments to the United States Constitution.

The United States District Court, without permitting said petitioners to make any showing at the time of the hearing on the Order to Show Cause, and on mere uncorroborated, unverified statements of counsel for respondent, issued its Order directing the petitioners to appear before an enforcement attorney of the Office of Price Administration and to testify and produce records in obedience to the subpoenas.

From this Order an appeal was taken by Jack Aros and Everett Hagan to the United States Circuit Court of Appeals for the Ninth Circuit, petitioners specifying eight grounds of error. The specifications with the Circuit Court's rulings are considered together:

(1) The petitioners assigned as error the District Court's failure to require respondent to produce proof of the materiality and relevancy of the information subpoenaed, when such materiality and relevancy was put in question by petitioners. The Circuit Court stated that a mere allegation in the respondent's petition that the testimony sought is material and relevant to his investigation

is all the showing necessary. The Circuit Court stated that the investigation was within the respondent's powers and the subpoenas show on their face the probable materiality of the documents sought.

(2) The petitioners assigned as error the respondent's failure, in his petition or otherwise, to charge any facts sufficient to show that the sales referred to in the subpoenas came within the provisions of any regulation issued by the respondent. The Circuit Court dismissed this assignment with the statement that it would judicially notice the respondent's regulations and that the presumption of regularity which normally attends the acts of administrative officers deprived that omission of compelling significance.

(3) The petitioners assigned as error the refusal of the District Court to permit proof of the invalidity of the subpoenas. The Circuit Court held this specification without merit.

(4) The petitioners assigned as error the fact that by using the abbreviation "etc." in describing the sought-for documents, the subpoenas were rendered unreasonable, uncertain and indefinite. The Circuit Court held that the District Court's Order cured this defect by omitting reference to the "etc."

(5) The petitioners assigned as error the District Court's holding that petitioners failed to answer and appear at the time and place called for in the subpoenas. The Circuit Court held that the District Court had not erred.

(6) The petitioners assigned as error the failure of respondent to serve J. A. Hagan, and the failure of respondent to show that petitioners had custody or control of the records in question. The Circuit Court held that

the uncorroborated, unverified hearsay statement of counsel for respondent made in the District Court was sufficient showing and that if petitioners do not control the records, the time for such showing is when the order of the District Court is disobeyed.

(7) The assignments of error, that the Court's order contravened the Fourth and Fifth Amendments, were dismissed by the Circuit Court with the brief comment that respondent had the authority to make the inquiry, the documents were described in the Order with sufficient definiteness and are relevant; that the books and documents sought by respondent were quasi-public records.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, Title 28, U. S. C. A. 347.

Judgment was entered by the Circuit Court of Appeals in the within case on June 21, 1946. No application for rehearing has been filed.

Questions Presented by This Petition.

(1) Where an administrative subpoena is invalid for reasons of uncertainty, indefiniteness, and unreasonableness, can such invalidity be cured by the Court's order enforcing compliance with said subpoenas.

(2) Where a respondent puts in issue the materiality and relevancy of the information and documents sought by way of administrative subpoena, must the District Court, before enforcing compliance with such subpoena, require a showing as to the materiality or relevancy of sought-for information and documents.

(3) Where the respondent puts in issue the materiality and relevancy of the information and documents sought

by way of administrative subpoena, is the mere allegation that such information and documents are material and relevant, without more, a sufficient showing upon which the District Court may order compliance with the subpoena.

(4) Where the Administrator fails, either in his petition or otherwise, to show facts sufficient to place the products sold by a merchant within any regulation issued by the Administrator, must the District Court require the Administrator to show the materiality or relevancy of the sought-for information prior to enforcing the subpoenas.

(5) Whether Congress has the authority to compel any person who is not engaged in the business of dealing with any commodity, to appear and testify or to appear and produce documents, or both at any designated place; and if it does possess that authority, can the Congress delegate that authority to the respondent.

(6) Whether the Emergency Price Control Act of 1942, as amended, permits the employees of respondent to require witnesses to testify or to produce documents in connection with an investigation of the type here instituted.

(7) If such investigation is permitted, whether the Act contemplated that the respondent could delegate his authority to make such investigation to a subordinate.

(8) Whether persons served with administrative subpoenas requiring the production of records, which records are not under their control or custody, have the right to make such showing on the hearing of the Order to Show Cause why the subpoenas should not be enforced, or only after such persons are compelled by force of those

facts, to disobey the District Court's Order enforcing the subpoenas.

(9) Where and when persons served with administrative subpoenas have the right to test the validity and authenticity of such subpoenas.

(10) Whether documents which a regulation or statute requires a person engaged in business to keep, have the status of quasi-public records in so far as employees of such person are concerned so as to deprive such employees of the protection of the Fifth Amendment.

Reasons Relied on for the Allowance of the Writ.

It is petitioners' contention that where an administrative subpoena is invalid for any reason, the Court's order enforcing compliance with such subpoena cannot cure the invalidity. Thus, as here, where the subpoena violated the Fourth Amendment, the Court cannot cure that defect. The Court can only enforce valid subpoenas, and such was the Congressional intention. *Emergency Price Control Act of 1942,* as amended, Section 205(e), *supra.* The Circuit Court of Appeals erred in holding that the District Court's Order cured the defective subpoenas.

The Circuit Court's decision on the questions as to the necessary showing as to materiality, relevancy and validity of the subpoenas conflicts with the decisions in other circuits, to wit: *Goodyear Tire and Rubber Company v. National Labor Relations Board,* 122 F. (2d) 450; *Bowles v. Beatrice Creamery Company* (C. C. A. 10th), 146 F. (2d) 774; *United States v. Davis* (C. C. A. 2d), 151 F. (2d) 140, and with the decisions of this Court in the case of *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298; *Oklahoma Press Pub. Co. v. Walling,* 66 S. Ct. 494.

Petitioners respectfully submit that Congress, itself, does not have the authority to subpoena the petitioners on facts such as are involved in this instance. In any event, if Congress could subpoena the petitioners, its act would be a legislative act and that power cannot be delegated. *Cudahy Packing Co. v. Holland,* 315 U. S. 357; *Interstate Commerce Commission v. Brimson,* 154 U. S. 447, 478, 479, 38 L. Ed. 1047, 1057, 1058; *Harriman v. Interstate Commerce Commission,* 211 U. S. 407, 418, 53 L. Ed. 253, 263.

The Circuit Court's decision, that the proper time to raise the question that petitioners do not have the custody or control of the documents is after disobedience of the Court's order enforcing compliance with the subpoenas, appears to conflict with this Court's decisions in *Cobbledick v. United States,* 309 U. S. 323, 329, 84 L. Ed. 783, 787; *Ellis v. United States,* 237 U. S. 434, 59 L. Ed. 1036; *Harriman v. Interstate Commerce Commission, supra.*

The questions presented in this petition are of great and immediate importance not only to these petitioners, but to all persons subject to the inquisitorial powers of administrative agencies, and their decision is vitally necessary so that their constitutional rights may be safeguarded and further that they may be properly advised as to such rights.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ABRAHAM GOTTFRIED,
Attorney for Petitioners.

Dated: July 8, 1946.

IN THE

Supreme Court of the United States

October Term, 1946.

No.....

J. A. HAGAN, individually, and doing business as EL REY CHEESE CO., JACK AROS and EVERETT HAGAN,

Petitioners,

vs.

PAUL A. PORTER, Administrator, OFFICE OF PRICE ADMINISTRATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Jurisdiction is conferred by Section 240(a) of the Judicial Code, 28 U. S. C. A. 347.

The judgment of the United States District Court was entered October 29, 1945. [R. 35.]

The opinion of the Circuit Court of Appeals was rendered and filed June 21, 1946. [R. 66; ..... F. (2d) .....]

The judgment of the Circuit Court of Appeals was entered June 21, 1946. [R. 75.]

No petition for rehearing was filed.

Jurisdiction.

The statute relied on is Section 240(a) of the Judicial Code, 28 U. S. C. A. 347.

The District Court's Order enforcing the alleged administrative subpoena in this case, affirmed by the Circuit Court of Appeals, is in conflict with decisions in other Circuits, as well as in conflict with decisions of this Court. The alleged subpoena, the hearing afforded in the District Court, and the Order issued by the District Court enforcing compliance with the alleged subpoena, violated the petitioners' rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. The petition having been filed within the statutory time, from a final decision by the Circuit Court of Appeals, properly invokes this Court's jurisdiction. 28 U. S. C. A. 347.

Statement of the Case.

While the appeal is entitled "J. A. Hagan, individually, and doing business as El Rey Cheese Company, Jack Aros and Everett Hagan," the appeal in the Court below was, and this petition is prosecuted by Jack Aros and Everett Hagan only as these are the only two parties served with subpoenas and they were the only two parties to whom the District Court's Order was directed.

Petitioners are merely employees of one J. A. Hagan, who is engaged in the manufacture and sale of certain types of cheese and cheese products. The respondent was, at the time of the decision by the Circuit Court of

Appeals, the Price Administrator of the Office of Price Administration. Despite the fact that the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23; U. S. C. A. Title 50, Appendix, Section 901-946), as amended (Pub. L. 108, 79th Cong., 1st Sess.) expired on June 30, 1946 and there may be some question of the continued existence of the respondent as Administrator, nevertheless Section 1(b) of said Act is sufficient to sustain this suit.

On August 13, 1945, alleged administrative subpoenas *duces tecum* were served upon each of the petitioners requiring each of them to appear and testify on August 16, 1945, before an Enforcement Attorney of the Office of Price Administration, concerning certain sales and purchases of cheese products made by J. A. Hagan, and to produce at the said time and place documents and records belonging to said J. A. Hagan concerning said purchases and sales. [R. 11-14, incl.]

On a previous occasion subpoenas *duces tecum,* couched in similar language but signed, not by the Administrator, but by one who purported to be an Acting District Director, had been served upon petitioners. Apparently recognizing the invalidity of these subpoenas the respondent took no steps to enforce said subpoenas, but instead served the subpoenas here in question.

On advice of counsel, and because of the obvious insufficiency and invalidity of the instant subpoenas, petitioners appeared specially on the return date for the purpose

of moving to quash the issuance of said subpoenas. [R. 20.]

Without any ruling on this motion, respondent applied to the United States District Court for an Order enforcing compliance with the subpoenas. [R. 2.] As a result of this petition an Order to Show Cause was issued by the United States District Court, returnable on October 29, 1945. [R. 22.]

Petitioners filed a reply in writing [R. 24] and appeared by counsel. [R. 40.] At this hearing counsel for the Administrator made a number of unsworn, uncorroborated statements with relation to J. A. Hagan and petitioners and to the records in question and, as a result of which the District Court, without permitting any testimony of any kind on the issues raised by petitioners' reply, issued an order directing the petitioners to appear and testify and produce documents and records concerning the sales by the El Rey Cheese Company of certain cheese. [R. 35.]

An appeal was taken by petitioners to the Ninth Circuit Court of Appeals from this Order [R. 37], specifying nine points upon which appellants intended to rely on appeal. [R. 59.] As outlined in the petition for Writ of Certiorari filed herein, the Circuit Court overruled each of the petitioners' specifications and affirmed the decision of the District Court. [R. 66.]

Specification of Errors.

1. Petitioners assigned as error in the Court below the issuance by the District Court of its Order enforcing the subpoenas where the respondent had failed utterly to make any showing, in his Petition to the District Court, of the relevancy or materiality of the evidence or documents sought by the subpoenas; and assigned as further error the District Court's failure to require the respondent to prove the relevancy or materiality of the evidence or documents so sought, when that issue was raised by petitioners' answer to the Order to Show Cause.

The Circuit Court treated these assignments of error as a contention by the petitioners that a showing of "probable cause" was a prerequisite for enforcement of the subpoenas. The Circuit Court held that such a showing was not necessary.

The Circuit Court erred in so misconstruing petitioners' specifications.

2. The Circuit Court erred in holding that the mere allegation of a conclusion by the respondent to the effect that the evidence and documents sought were relevant and material, was a sufficient showing.

3. The Circuit Court erred in holding that the standards of materiality and relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding.

4. The Circuit Court erred in holding that the hearing before the District Court was an *ex parte* hearing and not a trial or adversary proceeding.

5. The Circuit Court erred in holding that the inspection here undertaken by the respondent Administrator was well within his powers.

6. The Circuit Court erred in holding that the subpoenas show on their face the probable materiality of the documents sought.

7. The Circuit Court erred in holding that the omission by the respondent to charge facts sufficient to bring petitioners' sales within the provisions of a regulation, was not fatal.

8. The Circuit Court erred in failing to hold that the District Court had erred in refusing to hear evidence concerning the validity of the execution of the subpoenas.

9. The Circuit Court erred in not holding that the subpoenas were unreasonable, uncertain and indefinite, and in holding that the Order of the District Court cured any defects in the subpoenas.

10. The Circuit Court erred in holding that the District Court was clearly justified in finding that appellants had failed and refused to obey the subpoenas.

11. The Circuit Court erred in accepting the uncorroborated, unverified statements of counsel for respondents as to the relationship of J. A. Hagan and the petitioners to the records.

12. The Circuit Court erred in holding that the proper time to decide the issue of whether petitioners had the records in their control is when the order of the District Court is disobeyed.

13. The Circuit Court erred in holding that the Order and subpoenas do not violate the petitioners' rights under the Fourth and Fifth Amendments.

ARGUMENT.

I.

Where an Administrative Subpoena Is Invalid for Reasons of Uncertainty, Indefiniteness and Unreasonableness, Such Invalidity Cannot Be Cured by the Court's Order Enforcing Compliance With Said Subpoenas.

Section 202(e) of the Emergency Price Control Act of 1942, as amended, *supra*, reads as follows:

> "(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4(a)."

Petitioners respectfully submit that the basis of the District Court's action must be a valid subpoena and one not in violation of the Fourth Amendment. *Oklahoma Press Publishing Co. v. Walling,* 66 Sup. Ct. 494.

Even the Circuit Court of Appeals, by inference, admits that the use of the word "etc." at the end of the list of documents named in the subpoenas rendered the subpoenas uncertain, indefiinte, and unreasonable, in view of its refusal to consider this point and its insistence that the Court's order did not contain the word "etc." That

the use of the word "etc." rendered the subpoenas open to the objections named is without question.

Persons subject to a subpoena *duces tecum* should not be required to speculate as to which records were required by the Administrator to justify an order for the inspection of books or papers—the books or papers should be specified with reasonable certainty. 17 *Amer. Jur.* 33; *Bank of America v. Douglass,* 105 F. (2d) 100; *Bowles v. Beatrice Creamery Co.,* 146 F. (2d) 774; *Oklahoma Press Publishing Co. v. Walling, supra.*

If the subpoenas are invalid for any reason, there cannot be any contumacy by, or refusal to obey, such subpoenas. A definition of "lawful process" is set forth in *Bowles v. Beatrice Creamery Co., supra* (p. 779):

> "There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason imposes in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto."

II.

Where a Respondent Put in Issue the Materiality and Relevancy of the Information and Documents Sought by Way of Administrative Subpoena, the District Court Must Require, Before Enforcing Compliance With Such Subpoena, a Showing as to the Materiality or Relevancy of the Sought-for Information and Documents.

The subpoenas and the petition as filed in the District Court failed to show on their face the relevancy or materiality of the testimony or documents required by the subpoenas, other than the Administrator's self-serving conclusion in the petition that such testimony or documents are relevant or material. If the Circuit Court was correct in its views as to the necessity of any showing by the Administrator, no statement of any kind as to the materiality or relevancy would be necessary.

Respondent's language in its petition to the District Court indicates that it was conducting a general search and "fishing expedition." [R. 4-5.] No ground was shown for supposing that the documents called for contained evidence relevant to any inquiry, nor was there any statement, either in the petition or the subpoenas, stating the subject of any inquiry.

In *United States v. Davis* (C. C. A. 2), 151 F. (2d) 140, at p. 143, it is stated:

> "We are very clear that to continue in a business after it has been regulated * * * does not expose a dealer to any general search;"

In the case of *Goodyear Tire and Rubber Company v. National Labor Relations Board,* 122 F. (2d) 450, the Circuit Court of Appeals stated (p. 453):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer * * * We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable."

In the case of *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298, 305, 306, 44 S. Ct. 336, 337, 68 L. Ed. 696, 32 A. L. R. 786, the Court held as follows (p. 305):

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The District Court of Tennessee in the case of *Bowles v. Cherokee Textile Mills et al.*, 61 F. Supp. 584, denied an order enforcing an Administrative subpoena, basing its decision on the *Goodyear Tire and Rubber Company* and the *American Tobacco Company* cases (*supra*), even though, as the Court stated, the Emergency Price Control Act uses language broad enough to authorize the Court to compel production of documents, etc., whether of evidential value or not.

Respondent, by way of recital in his petition and as his conclusion, referred to three regulations under which J. A. Hagan was required to keep records. [R. 5.] However, there was no direct allegation in said petition that the sales of the commodities involved, to wit, Swiss Gruyere Type Cheese or Taylor Maid Gruyere Type Swiss Cheese, came under the said regulations or any of them. Unless the said commodities came under said regulations, the records required to be kept thereunder were immaterial and irrelevant and, further, said J. A. Hagan was not required to keep such records.

The subpoenas and petition to the District Court indicate that the Administrator was acting under three different regulations. Each of these regulations, as shown by the extracts in the Appendix attached hereto, require different records to be kept. For example, if the sales are subject to MPR 280, the documents covering purchases of the cheeses described in the subpoenas are immaterial and irrelevant.

A mere recital in respondent's petition to the District Court is insufficient to determine the relevancy of the records required to be produced where respondent does not allege and show that petitioners' sales came within the provisions of some one regulation.

III.

Where the Subpoena or the Petition to Enforce Said Subpoena Does Not Contain a Showing as to the Materiality or Relevancy of Sought-for Information and Documents, Then the District Court Must Require the Administrator to Make Such a Showing Before Ordering Compliance With the Subpoena, in Any Case Where the Respondent Puts in Issue the Materiality and Relevancy of the Information and Documents Sought to Be Obtained by Such Subpoena.

The subpoenas do not contain any evidence as to the materiality and relevancy of the information or documents sought. The petition merely contains a general conclusion of the respondent. [R. 7.] This allegation or conclusion was denied by the petitioners in paragraph 3 of their reply. [R. 25.]

Petitioners also raised the question of the materiality and relevancy of the said documents before the Court. [R. 48.] The District Court, however, refused to hear such evidence, stating that it would issue the Order [R. 46], and that the question of materiality would not be considered until appellants were cited for contempt. [R. 48, 53, 54.] It would appear from the above proceedings that the District Court was of the opinion that the Administrator was the sole judge of the materiality and relevancy of the documents sought to be produced and that the Court had no jurisdiction to review the administrative determination of said materiality or relevancy.

The Circuit Court of Appeals held that a showing of "probable cause" was not a prerequisite to the enforcement of an administrative subpoena issued under the Act. While the Circuit Court cites *Oklahoma Press Publishing Co. v. Walling, supra,* a reading of that decision indicates that this Court held just to the contrary, stating that a showing of probable cause "is satisfied in [the case] of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order and the documents sought are relevant to the inquiry. . . . Necessarily, as has been said, this cannot be reduced to formula, for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

Issuance of an order consequently is not mandatory on the District Court, but is within the discretion of the District Court, which discretion is to be judicially exercised. *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills, supra; Hale v. Hinckle,* 201 U. S. 43, 77.

In the case of an application to the Court for an order enforcing the subpoena issued by the Administrator, the person to whom the order or subpoena is directed is entitled to have an opportunity to test its validity. 42 *Amer. Jur.* 419; *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Bowles v. Beatrice Creamery Company, supra.*

A contention made in an answer to an Order to Show Cause that the documents called for have no relation to the particular matter in question, raises an issue of fact for determination by the Court and before the aid sought by the Administrator will be granted, it must appear from the evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. The burden of proof is on the Administrator to prove the relevancy of the documents sought. *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Federal Trade Commission v. American Tobacco Company, supra; Bowles v. Cherokee Textile Mills, supra.*

As may be seen from the quoted portions of Section 202(a) and (c) (see *infra* under Part IV of Argument), the power to use the subpoena is for the purpose of obtaining information:

(1) To assist the Administrator in prescribing a regulation or order under the Act, or

(2) In the Administration of the Act and regulations, orders and price schedules thereunder, or

(3) To enforce the Act and regulations, orders, and price schedules thereunder.

Thus, whether the information sought is material and relevant to the power granted is a matter of fact, which when placed in issue, must be determined by the Court after a showing by the Administrator. The respondent's conclusion that the information is material and relevant cannot foreclose the Court.

IV.

Congress Itself Does Not Have the Authority to Exercise the Power Which Respondent Claims; and Even if Congress Had That Power It Could Not Delegate It to Respondent.

The instant case is "on all fours" with that of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 263. In that case, the Commission sought to exercise the subpoena power in pursuance to its authority to recommend legislation to Congress. This Court raised the question of the extent of the Congressional power, as well as the delegation of such power, stating (p. 418):

> "Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

The power here sought to be exercised is that contained in Section 202 (a) and (c) of the Emergency Price Control Act of 1942, as amended, which reads:

> "Sec. 202.(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder."

* * * * * * * *

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place."

Petitioners respectfully submit that Congress, itself, possesses no constitutional authority to issue a subpoena in such an instance. Moreover, if it did, such power being purely legislative cannot be delegated to respondent.

Moreover, any attempt by Congress to grant to the Administrator this broad power without any limitation as to the mode of exercising it would be clearly contrary to the Constitution. The words in Section 202(a) "to obtain such information as he deems necessary or proper" must necessarily carry with them the limitation that the information requested must be relevant and material to the purposes for which the authority is granted.

V.

The Emergency Price Control Act of 1942 Does Not Authorize the Respondent to Conduct an Investigation of the Type and Character Involved; and if It Does, It Does Not Authorize Respondent to Delegate That Authority to Subordinate Employees.

Section 201(a) and (b) provides in part, as follows:

"Sec. 201.(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the 'Administrator'). * * * The Administrator may, subject to the civil service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and

shall fix their compensation in accordance with the Classification Act of 1923, as amended."

* * * * * * * *

"(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *"

In the instant case, while the subpoenas were allegedly signed by the person purporting to act as the Administrator, the person before whom the subpoenas were returnable, is denominated an enforcement attorney.

In the petition filed in the District Court by the same enforcement attorney, it was alleged that respondent deemed an investigation necessary to determine "if" there was evidence that J. A. Hagan and the Petitioners had complied with the provisions of the Act. [R. 4.] The attorney in the petition concluded, but without alleging any facts, that it was deemed necessary (without specifying by whom) in conducting said investigation to obtain such information from certain records of J. A. Hagan and Petitioners. [R. 4, 5.] However, the petition did not directly or even by implication allege that any violation had been committed by Petitioners, nor did it show how or in what manner the said records were relevant or material to any investigation permitted by law, by resting its demand upon the sole ground that "an" investigation necessary to determine "if" there was evidence.

Upon the hearing of the Order to Show Cause, counsel for respondent volunteered the statement, unsupported by any evidence or proof, or any allegation in the petition, that in the month of May, information had been brought to the Office of Price Administration that Petitioners

"were in violation of 'certain' regulations covering the sale of cheese," without in any manner stating what the violation consisted of or what regulation was violated. [R. 42,43.] This statement, in so far as Petitioners can determine, is the only inkling that appears that any violation by Petitioners if any, was even suspected, and even this statement is so vague and indefinite as not to have conveyed any meaning either to the Court or counsel. It certainly did not seem sufficiently substantial to respondent to make such an allegation in the petition or in the subpoenas.

Petitioners respectfully submit that Congress did not intend to confer upon the respondent a power as broad as was attempted to be exercised in this particular case, which would suggest the most general of "fishing expeditions."

Assuming, without conceding, that such a power was conferred upon the respondent, it seems obvious that Congress did not intend to permit the respondent to delegate that power to any member of the large host of enforcement personnel. *Cudahy Packing Co. v. Holland,* 315 U. S. 357.

A case "on all fours" with the instant one, is that decided by this Court in *Harriman v. Interstate Commerce Commission,* 211 U. S. 407, 53 Law. Ed. 253. In that case, the Interstate Commerce Commission also was attempting to exercise as broad as possible construction of its powers to elicit testimony and evidence by way of subpoenas. In that case, this Court stated (p. 419):

> "We are of the opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation

of the act, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.

"We could not believe, on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed."

As we have already stated, even if Congress had given the Administrator the power which he claims in this instance, we respectfully submit that Congress did not intend that he should have the authority to delegate said power. This Court in *Harriman v. Interstate Commerce Commission, supra,* stated, as follows (p. 418):

"Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

VI.

The Time to Make a Showing That the Records Called for by Subpoenas Are Not in Control or Custody of the Persons Upon Whom the Subpoenas Are Served, Is Upon the Return of the Order to Show Cause Why the Subpoenas Should Not Be Enforced and Not After Such Persons Have Violated the Order of the Court and Subjected Themselves to Contempt.

Both the District Court and the Circuit Court's finding that petitioners should disobey the Court's Order and in a contempt proceeding raise the defense that they did not have control or custody of the records in question, is patently erroneous. Where the District Court issues an Order to Show Cause why a subpoena should not be enforced, the hearing on such Order to Show Cause is the most logical time to make such showing.

The Order from which an appeal may be taken is the order issued at the time of the hearing on the return of the Order to Show Cause. An appeal from the Order adjudging petitioners in contempt of the District Court is not appealable. *Cobbledick v. United States,* 309 U. S. 323, 84 L. Ed. 783. In this case the Court stated (pp. 329-330):

> "One class of cases dealing with the duty of witnesses to testify presents differentiating circumstances. These cases have arisen under §12 of the Interstate Commerce Act, whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission. In these cases the orders of the district court directing the witness to answer have been held final and reviewable. Interstate Commerce Comm'n v. Brimson,

154 U. S. 447; Harriman v. Interstate Commerce Comm'n, 211 U. S. 407; Ellis v. Interstate Commerce Comm'n, 237 U. S. 434. Such cases were duly considered in the Alexander Case, and deemed to rest 'on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences.' 201 U. S. at 121. The differences were thought controlling. Appeal from an order under §12 was again here in the Ellis Case, supra, fully argued in the briefs, and again differentiated from a situation like that in the Alexander Case. 'No doubt' was felt that an appeal lay from the district court's direction to testify.

" 'It is the end of a proceeding begun against the witness'—was the pithy expression for this type of case. 237 U. S. at 442, 59 L. ed. 1040, 35 S. Ct. 645. And it is a sufficient justification for treating these controversies differently from those arising out of court proceedings unrelated to any administrative agency. The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under §12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself."

VII.

The Doctrine of Quasi-Public Records Applies Only to the Person Engaged in Business and Not to His Employees.

The Circuit Court's decision that the constitutional privilege against self-incrimination may not be invoked by petitioners who are merely employees of the person engaged in business, is a new and unwarranted extension of the doctrine of *Wilson v. United States,* 221 U. S. 361, and cases that have proceeded along similar lines. What the Circuit Court means by the statement that appellants are protected by Section 202(g) of the Emergency Price Control Act of 1942, as amended, in view of its statement that the Fifth Amendment does not apply to such records is unfathomable as far as petitioners are concerned.

CONCLUSION.

Petitioners respectfully submit that the decision of the Circuit Court of Appeal should be reversed on the grounds that the subpoenas in the instant case were invalid and that their invalidity was not cured by the Order of the District Court; that the District Court abused its discretion in not requiring the respondent to make a *prima facie* showing of the materiality or relevancy of the information and documents sought, and that the District Court abused its discretion in not permitting the petitioners to test the validity and legality of the subpoenas in the hearing on return of the Order to Show Cause.

Respectfully submitted,

ABRAHAM GOTTFRIED,

Attorney for Petitioners.

APPENDIX.

Regulations.

1. MAXIMUM PRICE REGULATION 280. (8 F. R. 5165.)

§1351.812. Records and reports. (a) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall also preserve all information and records required by §1351.807 of Temporary Maximum Price Regulation No. 22, and shall keep for examination by any person during ordinary business hours a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period, together with an appropriate identification of such product and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, rec-

ords showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

2. REVISED MAXIMUM PRICE REGULATION 289. (9 F. R. 5140.)

SEC. 5. *Records and reports.* (a) Every sale of a listed dairy product covered by this Revised Maximum Price Regulations 289, except as hereafter provided in this regulation, shall be invoiced by the seller. The original invoice shall be delivered to the buyer and shall state (1) the date of purchase, (2) the names and addresses of the buyers and sellers, (3) the quantity, grade, and type of package of each listed dairy product sold, (4) the price, per unit of sale and in total, and (5) the geographical place for which the price is calculated.

(b) Every buyer of any listed dairy product shall preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, the original, and every seller of any listed dairy product shall similarly preserve a copy, of each invoice required to be furnished by paragraph (a) of this section.

(c) Every person subject to this regulation shall keep such other records and shall submit such reports as the Office of Price Administration may from time to time request in writing, either in addition to or in substitution for records and reports therein required.

3. TEMPORARY MAXIMUM PRICE REGULATION No. 22 (7 F. R. 7914). This regulation, issued October 3, 1942, was superseded by Maximum Price Regulation No. 280 on December 3, 1942.

§1351.807. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall prepare, on or before October 24, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period together with an appropriate identification of such product, and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has

customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 331

J. A. HAGAN, INDIVIDUALLY, AND DOING BUSINESS AS EL REY CHEESE CO., JACK AROS AND EVERETT HAGAN, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the circuit court of appeals (R. 66–74) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 21, 1946 (R. 75). The petition for a writ of certiorari was filed in this Court on July 25, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTIONS PRESENTED

1. (a) Whether the inclusion of "etc." following a list of specified classes of documents required to be produced pertaining to purchases and sales of named cheeses during a specified period renders an administrative subpoena duces tecum invalid for reasons of uncertainty, indefiniteness and unreasonableness.

(b) If so, where an order of a district court which itself described the documents to be produced with sufficient particularity is nevertheless improper because the original subpoena, as issued by the Price Administrator, was invalidly indefinite.

2. Whether "books, records, ledgers, day books, and sales invoices", covering sales and purchases of commodities subject to price control, requested by the Price Administrator's subpoena, could properly be regarded by the Administrator as material and relevant to an investigation to assist in the administration and enforcement of the Emergency Price Control Act and regulations thereunder.

3. Whether Congress may constitutionally authorize the Price Administrator to issue subpoenas duces tecum for purposes of investigation to assist in the administration and enforcement of the

Emergency Price Control Act and regulations thereunder.

4. Whether the Emergency Price Control Act authorizes the Price Administrator to make investigations to assist in the administration and enforcement of the Emergency Price Control Act and regulations thereunder and to delegate to subordinate officials the authority to conduct such investigations.

5. (a) Whether the issue of respondent's custody of the documents sought to be produced by an administrative subpoena duces tecum should be determined at the hearing on judicial enforcement of the subpoena.

(b) If so, whether the Administrator's showing was sufficient to justify the conclusion that petitioners in fact had such custody.

6. Whether custodians of documents required by regulation to be kept for public purposes may assert the privilege against self-incrimination when called upon by subpoena duces tecum to produce such documents, where such custodians are responsible employees of the business involved.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App. Sec. 901 et seq.) and of Maximum Price Regulation 280 and Revised Maximum Price Regulation 289 and Temporary Maximum Price

Regulation 22 (7 F. R. 10144, 9 F. R. 5140, and 7 F. R. 7914, respectively) are set forth in the Appendix, pp. 19–24 *infra*.

STATEMENT

Petitioner J. A. Hagan is the owner, Jack Aros is the bookkeeper, and Everett Hagan the manager of the El Rey Cheese Co. (R. 2–3), which company is engaged in the wholesale cheese business, and is therefore subject to Maximum Regulation 280, Revised Maximum Price Regulation 289, and Temporary Maximum Price Regulation 22. Section 202 (b) of the Emergency Price Control Act requires sellers to keep such records and reports as the Price Administrator may direct and to permit the Administrator on request to inspect them. The provisions of the aforementioned regulations requiring the keeping of records relating to sales thereunder are set forth in the Appendix, pp. 21–24 *infra*.

On May 24, 1945, and on several occasions thereafter, the Administrator, pursuant to Section 202 of the Act,[1] attempted to examine petitioners' records in order to determine whether they had complied with the Act and the regulations. Petitioners on each occasion refused to permit the Administrator's investigators to make such investigation and inspection (R. 4–5). Thereupon, on June 9, 1945, a subpoena was issued, signed by the Acting District Director,

[1] See Appendix, *infra*.

ordering the petitioners Jack Aros and Everett Hagan to appear and produce before an enforcement attorney of the Office of Price Administration specified books and records of the El Rey Cheese Company (R. 10–11).[2] This subpoena was properly served (R. 15). On the return date, petitioners' attorney claimed that he would not permit his clients to answer it because it was not signed personally by Chester Bowles, the Price Administrator (R. 17). On August 13, 1945, subpoenas similar in content but signed personally by Chester Bowles were served upon Jack Aros, bookkeeper, agent, and attorney-in-fact of the El Rey Cheese Co., and Everett Hagan, manager, returnable August 16 (R. 18, 11–14). These subpoenas required the persons named therein to appear and testify concerning the sales and deliveries of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese, for the period from September 28 to October 2, 1942, and for the period from June 15, 1944 to July 28, 1945, and to produce "all the books, records, ledgers, day books, purchase and sales invoices, etc." covering the purchase and sale of the same commodities during the same periods (R. 11–14). On the return date an attorney for petitioners appeared specially for the purpose of quashing the issuance and service of the subpoenas

[2] J. A. Hagan lived in Arizona, outside of the jurisdiction of the court. He does not operate the business, and has placed it in the hands of his brother, Everett Hagan, and Jack Aros (R. 45).

upon various grounds: that the return date, August 16, 1945, was a legal holiday for all Federal offices; that he questioned the authenticity of Chester Bowles' signature; that insufficient notice was given; that the Fourth Amendment of the Constitution was violated; and that the information requested was not material to any investigation authorized by the Price Administrator nor within his authority to demand (R. 21–22). The Administrator pursuant to Section 202 (e) of the Act, thereupon applied to the district court for an order compelling obedience to the subpoenas. Affidavits were submitted in support of the Administrator's petition and in opposition. (R. 14–20, 26–35). After a hearing, the court, on October 29, 1945, entered orders directing petitioners Jack Aros and Everett Hagan to comply. The terms of the subpoenas, as issued by the Administrator, were followed, except that the phrase "etc." following the list of records required to be produced was eliminated. (R. 35–37). On June 21, 1946, these orders were affirmed by the circuit court of appeals for the ninth circuit (R. 66–74).

ARGUMENT

1. *The subpoenas, either as issued by the Administrator or as enforced by the court, were not uncertain, indefinite, or unreasonable.* Petitioners contend that the court below erred in affirming the district court's enforcement of the

subpoenas duces tecum issued by the Administrator, on the ground that these subpoenas were invalidly uncertain, indefinite, and unreasonable. This argument is based entirely on the fact that the subpoenas, as issued by the Administrator, asked for the production of "all of the books, ledgers, day books, purchase and sales invoices, *etc.*" in the sales of two specified cheeses for the periods from September 28, to October 2, 1942 and from June 15, 1944 to July 28, 1945. This inclusion of the "etc." is apparently objected to as calling for production of an undefined and unlimited range of documents.

The only issue before the circuit court of appeals, however, was the propriety of the order of the district court,[3] and in that order the "etc.," which petitioners have found so offensive, had been eliminated. It is difficult to conceive of an order more certain, definite, reasonable, and precise in terms, than that of the district court requiring petitioners to appear and produce documents. The documents ordered to be produced are a definitely enumerated list—books, records, ledgers, day books, and purchase and sales invoices; the periods involved are precisely specified; likewise, the commodities covered are denoted by style name. If the subpoenas as drawn by the Administrator were too loose in

[3] See *Cudmore* v. *Bowles*, 145 F. 2d 697, certiorari denied, 324 U. S. 841 (App. D. C.).

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their description of the documents sought, the district court properly, in the exercise of its discretion, modified them to render them valid, and then enforced them as modified. There is no reason why the district court should have been compelled to accept or reject them in their entirety, any more than a court enforcing any order of an administrative body is denied discretion, where it finds the order partially illegal, to enforce it insofar as it is valid. Cf. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332.

Even if the court's order were to be tested by the subpoenas as drafted by the Administrator instead of as modified by the court, they could not be regarded as unreasonably general in coverage. The "etc." would be subject to the normal interpretation pursuant to the rule of *eiusdem generis,* and would mean merely other records pertinent to the same subject matter, i. e., to sales of the two specified cheeses in the specified periods. Even if the term "etc." were construed as including *all* documents relating to all of the transactions in the two cheeses in question, they would still be enforceable. *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 554; *Nelson* v. *United States,* 201 U. S. 92.

2. *The materiality and relevancy of the information and documents sought were apparent on the face of the subpoenas, petition, and supporting affidavits.* Petitioners' second and third points are based on the assumption that the

materiality and relevancy of the information and documents sought were not apparent from the face of the subpoenas, petition, and supporting affidavits.[4] On this assumption, they conclude that the district court erred in enforcing compliance with the subpoenas without requiring further proof. However, the documents sought were "books, records, ledgers, day books, purchase and sales invoices" covering for specified periods, purchases, sales, and deliveries of cheeses subject to price control, maximum prices on which had been established by regulations of the Price Administrator (R. 11–14). Contrary to petitioners' contention (Brief, p. 17), the purpose of the investigation was explicitly stated—namely, to determine whether petitioners had complied with the Act and regulations (R. 4). Such an investigation was authorized under Section 202 of the Act. Section 202 (a) authorizes the Administrator "to make such * * * investigations * * * as he deems necessary or proper to assist him * * * in the administration and enforcement of this Act and regulations," and under Section 202 (b) the Administrator "may, whenever necessary, by subpena require any such person [i. e., a person dealing in a regulated commodity] to appear and testify or to appear and produce documents, or both, at any designated place." It is difficult to

[4] The probable materiality of the records may appear from the face of the subpoena and petition supporting it. *Brown* v. *United States*, 276 U. S. 134, 143.

conceive of any records which would be more material and relevant to an investigation to determine whether petitioners had complied with these regulations and to assist in the enforcement of the Act and the regulations, than the documents evidencing the very transactions in question. The cases cited on pp. 17–22 of petitioners' brief have no bearing, since there is no fishing expedition here into "records, relevant or irrelevant, in the hope that something will turn up" (*Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306). The only documents sought are relevant to a lawful inquiry, within the rule of *Oklahoma Press Publishing Co.* v. *Walling,* decided February 11, 1946, Nos. 61, 63 October 1945 Term, slip sheet pp. 15–16, 66 S. Ct. 494, 505–506.

Petitioners rely in part on the fact that there was no direct allegation in the petition that the sales of the commodities specified came under the maximum price regulations. However, such an omission is of no importance, for, (1) as the court below pointed out (R. 70), the Federal Register Act (49 Stat. 500, 502, 44 U. S. C. Sec. 307), provides that the court shall take judicial notice of the provisions of the regulation; (2) the question of coverage need not be determined in advance of investigation. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501.

3. *It was within the powers of Congress to subpoena the information sought or to delegate such power to the Price Administrator.* Petitioners rely on *Harriman* v. *Interstate Commerce Com-*

mission, 211 U. S. 407, to assert that the subpoena powers conferred by Sections 202 (a) and (c) of the Emergency Price Control Act are beyond the powers of Congress to exercise or confer, and they assert that that case is "on all fours" with the instant case. All that that case held, however, was that Congress had not delegated to the Interstate Commerce Commission the power to delve into the affairs of railroads in order to obtain information on the basis of which legislation could be recommended to Congress. In that case, this Court added that a serious constitutional question would have been raised had such delegation been made. The powers conferred upon the Price Administrator, however, do not authorize investigations unlimited in scope, or for purposes of recommending legislation, but only into such matters as are deemed by the Administrator to be necessary and proper to accomplish certain specified purposes, namely the establishment of orders and regulations under the Act and the administration and enforcement of the Act and regulations. These are precisely comparable to the purposes for which the *Harriman* case held that the Commission *did* have the power to issue subpoenas: the regulation of the interstate business of carriers, and the enforcement of the regulations enacted. 211 U. S. at 419. If it was constitutional for Congress to establish a program of price control, it was likewise constitutional for it to provide for such means as were necessary and

proper to accomplish it. Cf. *Oklahoma Press Publishing Co.* v. *Walling,* decided Feb. 11, 1946, Nos. 61, 63 October 1945 Term, 66 S. Ct. 494.

Nor is there any validity to petitioners' contention that the power of Congress to authorize the use of the subpoena to further a lawful inquiry does not extend to the point where *employees* of sellers can be required to testify or produce records. If this were true, the Administrator would be powerless to investigate any corporation, or any other type of business organization subject to absentee ownership.[5]

4. *The investigation was authorized by the Emergency Price Control Act, and the Administrator was empowered to delegate his investigative powers.* There is no merit whatever in petitioners' contention that the investigation for which the subpoenas were issued was one beyond the powers of the Price Administrator. The investigation was "to determine if there was evidence that respondents [petitioners herein] and each of them had complied with the provisions of the Act and the regulations thereunder" (R. 4).

[5] Even the records of persons in no respect subject to price control may be subpoenaed where necessary to an investigation of persons who are subject to price control. *Bowles* v. *Shawano National Bank*, 151 F. 2d 749 (C. C. A. 7), certiorari denied, Feb. 25, 1946, No. 674, October 1945 Term; cf. *President of the United States* v. *Skeen*, 118 F. 2d 58, 59 (C. C. A. 5).

As previously shown, Section 202 of the Act authorizes precisely such investigations.

The contention that Congress did not intend investigations where no violations have been found and alleged in advance ignores the fact that a primary purpose of the subpoena is to enable the Administrator to discover whether there has in fact been a violation, not to corroborate something which he already knows. Cf. *Blair* v. *United States,* 250 U. S. 273, 282; *Oklahoma Press Publishing Co.* v. *Walling,* decided Feb. 11, 1946, Nos. 61, 63 October 1945 Term, slip sheet p. 21, 66 S. Ct. 494, 509; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501.

The further contention that Congress did not intend to permit the Administrator to delegate his investigative powers cannot be taken seriously. If the Administrator must personally take the testimony in the many hundreds of investigations which occur daily in all parts of the country, then enforcement of the Act would be at a virtual standstill. The delegation of the functions of establishing maximum rent regulations (*Bowles* v. *Griffin,* 151 F. 2d 458 (C. C. A. 5)), of instituting enforcement suits (*Bowles* v. *Wheeler,* 152 F. 2d 34 (C. C. A. 9), certiorari denied, 326 U. S. 775), and of issuing and signing subpoenas (*Porter* v. *Murray,* decided June 28, 1946 (C. C. A. 1); *Pinkus* v. *Porter,* 155 F. 2d 90 (C. C. A. 7); *Porter* v. *Gant-*

ner & Mattern Co., decided June 24, 1946 (C. C. A. 9); *Raley* v. *Porter*, decided June 17, 1946 (App. D. C.) has been upheld [6] by the courts.

5. *The district court was not required to adjudicate the issue of the custody and control of the records at the proceeding to enforce the subpoenas; and in any event, there was sufficient basis for the court to find that Everett Hagan and Jack Aros had such custody.* Petitioners assert that the district court erred in not considering the defense that Jack Aros and Everett Hagan did not have custody and control of the records required. There is no requirement, however, that the issue of such custody must be adjudicated at the time of the order enforcing the subpoenas rather than at such time as contempt proceedings are brought for disobedience of the order.[7]

[6] The Circuit Court of Appeals for the Sixth Circuit has just rendered a decision contrary to those of the four circuits cited above with respect to delegation of the subpoena power. *Porter* v. *Mohawk Wrecking and Lumber Co.*, decided August 8, 1946 (C. C. A. 6).

[7] An order requiring a person to produce certain documents must be construed as referring to such of the documents as are in that person's power to produce. If he lacks such power as to any or all of the documents ordered, the proper way to show this is to obey the subpoena and appear before the Administrator with such documents, if any, that he is able to produce. (This is especially true in a case such as the instant one, in which petitioners were ordered to appear and testify as well as produce documents.) If the Administrator doubts the statement of lack of custody, its truth can be tested in contempt proceedings. *McGarry* v. *Securities and Exchange Commission*, 147 F. 2d 389 (C. C. A. 10). In the instant case, however, petitioners did not appear on

McGarry v. *Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. C. A. 10). In *Bowles* v. *Insel et al.*, 148 F. 2d 91 (C. C. A. 3), the same objection of lack of custody was raised by appellant who was objecting to the enforcement of a subpoena by the district court. The circuit court of appeals dismissed this argument as one "so lacking in merit as not to warrant discussion." See also *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F. 2d 330 (C. C. A. 2).[8]

In any event, there was sufficient basis for the district court to conclude that petitioners Everett Hagan and Jack Aros did have custody and possession of the records. While they both, in

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the return date of the subpoena, but merely sent in their attorney, who appeared specially and moved to quash the subpoenas on various grounds, not including lack of custody. They sought to show lack of power to produce the documents by direct attack on the subpoenas in the court proceedings for their enforcement, and have continued this line of attack on successive appeals. Since the subpoenas require them to produce only such documents as they are able to produce, petitioners' tactics must be regarded as not designed to protect their interest or preserve their rights, but merely to achieve the greatest possible delay.

[8] *Cobbledick* v. *United States*, 309 U. S. 323, relied on by petitioners, is in no respect in point. There it was held that denial of a motion to quash a subpoena to appear before a grand jury was not appealable; it was also pointed out in the opinion that a court order requiring testimony before an administrative tribunal was appealable. However, no contention has ever been made in the case at bar that the order involved is not appealable; nor does the question of the appealability of the order have any bearing on the scope of issues before the trial court.

their affidavits, denied that the records were in their control, they did not disclaim custody or possession (R. 26–34). At the hearing, counsel for the Administrator stated that opposing counsel was well aware that J. A. Hagan, the owner of the business, resided in Arizona, and did not operate the business, placing it in the hands of Everett Hagan and Jack Aros; and that the latter were manager and bookkeeper of the concern and that all records were under their management and control (R. 45). This statement was not disputed by counsel for petitioners. J. A. Hagan did not appear or submit affidavits concerning the custody or control of the records. There thus was ample justification for the district court to decide that Everett Hagan and Jack Aros had custody and possession of the records. Nothing could be gained by requiring more elaborate proceedings which could arrive only at the same result.

6. *There was no violation of the Fifth Amendment.* The privilege against self-incrimination does not extend to the point of permitting the withholding of records required by law to be kept. *Wilson* v. *United States,* 221 U. S. 361, 380; *Davis* v. *United States,* decided June 10, 1946, No. 404, October 1945 Term; *Bowles* v. *Glick Bros. Lumber Co.,* 146 F. 2d 566 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Rodgers* v. *United States,* 138 F. 2d 992 (C. C. A. 6). The records sought in the instant case fall within that category. Petitioners seek to distinguish the *Wilson* case on the ground that

they are merely employees of the company whose records are sought. The same argument was made in the *Wilson* case itself, however, and rejected. Moreover, if, as employees, petitioners were not themselves in a responsible position, they could not be guilty of a crime and would have no claim of possible incrimination of themselves, nor could they assert the claim on behalf of another, such as J. A. Hagan, the absentee owner of the business. *Hale* v. *Henkel,* 201 U. S. 43; *Wheeler* v. *United States,* 226 U. S. 478. And if they acted in a managerial capacity to the extent that they might be personally liable for violations, as appears to have been the case, they themselves were likewise individually under the obligation to keep and produce the records just as though they had been proprietors.

Even if the petitioners had a legitimate claim that the production of the records sought would tend to incriminate them, Section 202 (g) of the Act would compel their production. That section provides that no person shall be excused from complying because of the privilege against self-incrimination, but that the immunity provisions of the Compulsory Testimony Act of 1893 were to apply to any individual who specifically claimed his privilege. Thus if petitioners had a claim of privilege, the proper method of asserting it is to claim the privilege, produce the documents required, and then if subsequent criminal proceedings are brought against them, to assert the im-

munity conferred by the Compulsory Testimony Act.

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and no question of public importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

DAVID LONDON,
Director, Litigation Division.

SAMUEL MERMIN,
Solicitor, Litigation Division.

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SEPTEMBER 1946.

APPENDIX

STATUTE

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Sec. 901 et seq):

Section 202 (a):

> The Administrator is authorized to make such studies and investigations, *to conduct such hearings,*[1] and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, order, and price schedules thereunder.

Section 202 (b):

> The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories,

[1] Added by sec. 105 (a) of Stabilization Extension Act of 1944 (58 Stat. 632).

and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 202 (c):

For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 202 (e):

In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

Section 202 (g):

No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act

of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

REGULATIONS

1. Maximum Price Regulation 280. (7 F. R. 10144):

§ 1351.812. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall also preserve all information and records required by § 1351.807 of Temporary Maximum Price Regulation No. 22, and shall keep for examination by any person during ordinary business hours, a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period, together with an appropriate identification of such product and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280, every person selling a listed food product shall keep and make available for examination by the

Office of Price Administration records of the same kind as he has customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

2. Revised Maximum Price Regulation 289. (9 F. R. 5140.):

SEC. 5. *Records and reports.* (a) Every sale of a listed dairy product covered by this Revised Maximum Price Regulation 289, except as hereafter provided in this regulation, shall be invoked by the seller. The original invoice shall be delivered to the buyer and shall state (1) the date of purchase, (2) the names and addresses of the buyers and sellers, (3) the quantity, grade, and type of package of each listed dairy product sold, (4) the price, per unit of sale and in total, and (5) the geographical place for which the price is calculated.

(b) Every buyer of any listed dairy product shall preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, the original, and every seller of any listed dairy product shall similarly preserve a copy, of each invoice required to be furnished by paragraph (a) of this section.

(c) Every person subject to this regulation shall keep such other records and shall submit such reports as the Office of Price Administration may from time to time request in writing, either in addition to or in substitution for records and reports therein required.

3. Temporary Maximum Price Regulation No. 22. (7 F. R. 7914.) This regulation, issued October 3, 1942, was superseded by Maximum Price Regulation No. 280 *supra* on December 3, 1942:

§ 1351.807. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall prepare, on or before October 24, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period, together with an appropriate identification of such product, and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

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